INDEX

CITATIONS

284000—41——1

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 619

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 747) is reported in 114 F. (2d) 33.

JURISDICTION

The decree of the Circuit Court of Appeals was entered September 13, 1940 (R. 757–759). Petition for writ of certiorari was filed December 12, 1940. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission

Act, c. 311, 38 Stat. 719 (15 U. S. C., sec. 45), and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission is authorized to prohibit not only General Motors Corporation but also a subsidiary thereof engaged solely in financing, from promoting the interstate sale and distribution of General Motors cars by means of misleading representations concerning a plan for financing retail purchases, on credit, of General Motors cars.

2. Whether the unfair methods of competition in commerce which the Commission is authorized to prohibit include representations (made in promoting interstate sales) which are not inherently false but which are calculated to mislead, and do mislead, a substantial part of the purchasing public.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, c. 311, 38 Stat. 719 (15 U. S. C., sec. 45), provides in part as follows:[1]

> That unfair methods of competition in commerce are hereby declared unlawful.

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[1] The Commission instituted this proceeding before, but concluded it after, section 5 was amended by the Act of March 21, 1938, c. 49, 52 Stat. 111 (15 U. S. C., Supp. V, sec. 45). The amendments are not pertinent to the questions presented in this case.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

STATEMENT

This case involves the validity of an order of the Federal Trade Commission entered in a proceeding under section 5 of the Federal Trade Commission Act directing petitioners to cease and desist from making certain representations which the Commission found to be misleading concerning a plan for financing retail purchases of General Motors cars. Petitioners are General Motors Corporation (referred to herein as General Motors), and two of its wholly owned subsidiaries, General Motors Sales Corporation and General Motors Acceptance Corporation (referred to herein, respectively, as the Sales Corporation and GMAC). The Commission based its order on detailed findings of fact which may be summarized as follows:[2]

General Motors manufactures various makes of automobiles but it does not itself sell these cars either to dealers or to the general public (R. 19–20). At the time the Commission issued its complaint General Motors sold the cars manufactured by it

[2] The petition for writ of certiorari does not question the sufficiency of the evidence to support the Commission's findings.

to five completely owned subsidiary corporations [3] whose sole function consisted in selling and shipping these cars to dealers for resale by the dealers to the general public (R. 20, 22). Following the incorporation of the Sales Corporation in 1936 as a wholly owned subsidiary of General Motors, the five former subsidiary selling corporations were dissolved and the Sales Corporation acquired all of their assets and assumed and carried out all of their functions as selling agents for General Motors (R. 21).

The relationship between the Sales Corporation and the dealers to whom it sells is established by contract (R. 23). The contract, which is subject to cancellation on short notice, outlines generally the way in which the dealer shall conduct his business and the manner in which he may purchase and sell the type of car in which he is authorized to deal (R. 23–24). The authorized dealers in General Motors cars, of whom there are several thousand located throughout the United States, are aided in the resale of General Motors cars to the public by the entire corps of General Motors subsidiaries, including the Sales Corporation and GMAC (R. 22).

GMAC, which was incorporated in 1919, was organized by General Motors for the purpose of

[3] Chevrolet Motor Company, Olds Motor Works, Pontiac Motor Company, Buick Motor Company, and Cadillac Motor Car Company (R. 20).

extending credit to its dealers and for the purpose of financing retail purchases of its cars on credit (R. 21). When a retail customer purchases a General Motors car on credit, he executes a conditional sales contract, chattel mortgage, or other credit device, providing for discharge of his indebtedness in monthly installments, usually 12, 18, or 24 in number (R. 24). The dealer is at liberty to assign the purchaser's contract to GMAC if the contract is acceptable to it and receives the approximate value thereof, and GMAC thereupon collects the monthly installments from the retail purchaser as the installments become due (R. 22). GMAC performs this financing function exclusively in connection with sales of General Motors cars negotiated by General Motors authorized dealers, except that it finances used cars of other makes taken by these dealers in trade (*ibid.*).

In the fall of 1935 General Motors, through its various subsidiaries, announced a new plan for financing the purchase of its cars, the plan being described as the "6%" or "Six Per Cent" plan (R. 24). The plan was widely advertised in newspapers of general circulation published on October 2, 1935 (R. 24–25). Under the plan the amount paid by the purchaser is determined by adding the unpaid balance of the purchase price and the cost of insurance and multiplying the sum of these two items by 6% if payment is to be made in 12 monthly installments and by one-half of 1% per month if

payment is to be made in more or less than 12 months (R. 25, 29).[4] The purchaser pays the total amount due from him, as thus determined, in equal monthly installments (*ib.*). The purchaser is therefore charged 6%, 9%, or 12% (depending on the number of his monthly payments) on the amount of his original indebtedness although this indebtedness does not remain outstanding during the period of the contract but is reduced by each monthly payment and the financing charge paid by the purchaser is approximately twice the amount of interest at 6% per annum on the monthly declining balance of the purchaser's indebtedness (R. 29–30).

In the advertisement of October 2, 1935, this method of financing was described as "a new 6% Plan" (R. 25). The advertisement stated that the plan considerably reduced the cost of financing car purchases and that it "provides for convenient time payments of the unpaid balance on your car—including cost of insurance *and a financing cost of 6%*" (*ib.*).[5] It stated that the plan "is not 6% interest, but simply a convenient multiplier anyone can use and understand", but most of the later advertisements dealing with the plan did not explain its provisions and confined themselves to a short reference to the "6%" plan (R. 25, 26). Typical

[4] For example, if payment is to be made in 24 monthly installments, the multiplier is 12%; if in 18 monthly installments, the multiplier is 9% (R. 29).

[5] Italics ours.

references to it in these advertisements (R. 26–27) are set forth below.[6] The "6%" plan was also highly publicized by the use of billboards and window posters, many of which featured the symbol "6%" in a size far greater than most of the other lettering (R. 27).

Some of this advertising was published and paid for by GMAC and some of it was published and paid for by General Motors' five selling subsidiaries (R. 26, 27).

The foregoing advertising not only tended to mislead, but actually did mislead, a substantial part of the purchasing public into the erroneous belief that the "6%" finance plan contemplates a simple interest charge of 6% per annum upon the deferred and unpaid balance of the purchase price (R. 31–32). It caused and tended to cause the public to buy General Motors cars because of this erroneous belief (R. 31–32). Its purpose was to promote the sale of General Motors cars and it had this effect (R. 27, 30).

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[6] Compare Chevrolet's low delivered prices and the new, greatly reduced GMAC 6% Time Payment Plan.

All Pontiac cars can be bought on GMAC's new 6% Plan which greatly reduces the cost of buying on time.

The new GMAC 6% Time Payment Plan not only simplifies financing but actually cuts the cost of buying a car on time.

New 6% GMAC Time Payment Plan.

Available on GMAC's new 6% Time Payment Plan.

28400—41——2

The announcement and use of the "6%" plan gave General Motors such a competitive advantage that by the middle of January 1936 all of its principal competitors [7] were forced to announce similar "6%" financing plans (R. 28). The Commission issued complaints against these competitors and all of them except the Ford Motor Company executed agreements during the spring or summer of 1936 to cease and desist from the practices alleged in these complaints (*ib.*). At this time General Motors and its subsidaries discontinued *advertising* the "6%" plan but it and they still use it and they furnish dealers with the necessary contract forms and the tabulation and data requisite to compute charges under the "6%" plan (R. 28–29).

There is a regular flow of commerce in cars manufactured by General Motors from its factories in Michigan to retail purchasers in other States and the advertisement and use of the "6%" plan by GMAC furthered this interstate movement (R. 31).

The order entered by the Commission directs General Motors and "any" subsidiary thereof to cease and desist, in connection with the interstate sale and distribution of motor vehicles, from using the words "six per cent" or the figure "6%" in connection with the cost of any plan for financing

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[7] Chrysler Corporation, Ford Motor Company, Graham-Paige Motors Corporation, Hudson Motor Car Company, Nash Motors Company, Packard Motor Car Company, Reo Motor Car Company.

the purchase of cars on a deferred payment basis, when the financing charge paid by the purchaser exceeds "simple interest at the rate of 6% per annum * * * calculated on the basis of the unpaid balance due as diminished after crediting installments as paid" (R. 34).

The Circuit Court of Appeals unanimously affirmed the Commission's order. It held that since the Commission, having discretion to deal with the matter, had found, "upon substantial evidence," that petitioners' form of advertising resulted in deception of the public, it was not for the courts to revise the Commission's judgment even if, as petitioners contended, the advertising could mislead only the careless or the incompetent (R. 755). It also held that since GMAC was a wholly owned subsidiary of General Motors and "acted as an agent of General Motors in a unified plan of selling and financing cars shipped in interstate commerce", the contention that the Commission was without jurisdiction because GMAC was not itself engaged in interstate commerce was without merit (R. 756).

ARGUMENT

I

We submit that the decision below upholding the Commission's order against GMAC presents no novel or unsettled question as to the construction or application of the Federal Trade Commission

Act. Assuming, as petitioners contend, that the financing activities of GMAC do not constitute either commerce or interstate commerce, this is irrelevant. The statute declares unfair methods of competition in commerce to be unlawful. In order to come within this prohibition, there must be competition in interstate commerce promoted or furthered by unfair methods, but it is settled beyond any doubt that the unfair competitive methods need not themselves constitute interstate commerce. Gambling is not interstate commerce but promoting interstate sales by an appeal to the gambling instinct of the ultimate retail purchaser is a violation of the act. *Federal Trade Commission* v. *Keppel & Bro., Inc.,* 291 U. S. 304. Manufacture is not interstate commerce but use by the seller of a trade or corporate name which tends to cause purchasers to believe that the seller itself manufactures the product which it purveys is a violation of the act. *Federal Trade Commission* v. *Royal Milling Co.,* 288 U. S. 212.

In the instant case the competition in commerce is the competitive interstate sale and distribution of automobiles and the unfair methods used in this competition are the deceptive representations made as to the nature of the credit terms offered purchasers of General Motors cars. When a product such as automobiles is sold to the purchasing public on credit, or partly on credit, misrepresentation as to the terms upon which credit is offered to

purchasers has exactly the same competitive effect as a misrepresentation as to price.[8] The act is violated because the deceptive statements made by General Motors and its subsidiaries concerning the "6%" finance plan unfairly promoted interstate trade in General Motors cars, to the injury of competitors.

The gist of petitioners' contention seems to be: (1) the Commission is authorized to issue an order only against one who uses unfair methods of competition in interstate commerce, (2) since GMAC does not sell or distribute automobiles, it was not a party to the competition in commerce involved in the present proceeding, and (3) the Commission therefore lacked authority to enter an order against GMAC.

In answering this contention, it is sufficient to point out that it ignores the decisive fact that GMAC was the mere agent or instrumentality of General Motors. The Commission, having found that General Motors had been using unfair methods of competition in commerce through the instrumentality (in part) of its controlled subsidiary GMAC, was authorized to include GMAC in the order against General Motors for the purpose of preventing possible evasion of the order by General Motors through the medium of this same instrumentality.

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[8] Misrepresentation as to price is one of the most obvious and flagrant methods of unfair competition. See *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, 114–117.

General Motors did not itself publish any representations, deceptive or otherwise, concerning the "6%" finance plan but it made such representations through certain wholly owned corporations (GMAC and General Motors' five selling subsidiaries). A corporation may, of course, make deceptive representations (constituting unfair methods of competition) through the instrumentality of a subsidiary, just as a corporation may engage in interstate commerce "through the instrumentality of subsidiaries" (*Electric Bond & Share Co.* v. *Securities and Exchange Commission,* 303 U. S. 419, 440). General Motors engaged in unfair methods of competition because the acts of its controlled subsidiaries (including GMAC) were its acts. Likewise, if General Motors should in the future continue, through the medium of GMAC, the practices prohibited by the Commission's order against General Motors, this would constitute a violation of the order.

Since the Commission's order would, in effect, be binding upon GMAC even if GMAC had not been expressly included in the order,[9] the Commis-

[9] It is significant that the Commission's order runs against "any" subsidiary of General Motors. The order (R. 34) provides that "the respondent General Motors Corporation, directly or through its subsidiary, General Motors Sales Corporation, *or any other subsidiary*, and respondent General Motors Acceptance Corporation, their respective officers, representatives, agents, and employees * * * do forthwith cease and desist * * *." (Italics ours.)

sion was clearly authorized to make explicit the prohibitions implicit in its order against General Motors. Moreover, the Commission was authorized to enter an effective order of prohibition and including GMAC in the order tends to simplify enforcement of the order against General Motors and to prevent possible evasion of this order. This Court has held that the power conferred upon the Commission to prohibit unfair methods of competition authorizes it to enter an effective order and that it may include in its order, where the circumstances show this to be a reasonable means of preventing evasion, persons who were not shown to have participated in the unfair methods of competition against which the order is directed. *Federal Trade Commission* v. *Standard Education Society,* 302 U. S. 112, 119–120, *supra.*

In the case just cited all of the stock of the Standard Education Society was owned by three individuals, each of whom was also an officer of the Society. After the Commission had filed a complaint against the Society under section 5 of the Federal Trade Commission Act, the three stockholders organized a second corporation for the purpose of evading any order which the Commission might issue against the Society. The Commission, having issued a supplemental complaint making the three stockholders and the second corporation respondents, entered an order against the two corporations and the three

stockholder-officers. On review, the Circuit Court of Appeals held that the Commission could issue an order against the individuals only in so far as the evidence tended to implicate them in the unfair methods of competition employed by the corporate respondents, and, applying this principle, it set aside the order as against one individual respondent and set the order aside in part as against the other two.[10] This Court held that the Commission's order should be reinstated in full against the individual respondents. It pointed out (p. 120) that the Commission was justified in reaching the conclusion that it was necessary to include the individual respondents in its order if the order "was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist." It also said (p. 119):

> Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respondents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

II

One of the questions presented in the writ of certiorari is whether the Commission is authorized

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[10] *Federal Trade Commission* v. *Standard Education Society*, 86 F. (2d) 692, 695, 697–698 (C. C. A. 2d, 1936).

to prevent the use of statements which, while they may mislead the trusting or ignorant, are "true as well as reasonably informative." We submit that no such question is presented in this case since petitioners' statements were neither "reasonably informative" nor "true."

Much of petitioners' advertising exploited, without any explanatory statement, what was described as a new "6% Plan" or "6% Time Payment Plan" (*supra*, pp. 6–7). Clearly this was not "reasonably informative." Neither can it be properly characterized as "true." Its truthfulness depends upon what the general public understands a "6% Plan" to mean, as used with reference to a plan for installment payments by customers buying on credit. So tested, petitioners' statements were not true since a substantial part of the purchasing public understood that "6%," when used in this connection, meant an interest charge of 6% on the purchasers' indebtedness as reduced by his monthly installment payments (R. 31–32).

The case does present the question whether promotion of interstate trade by statements not inherently false but resulting in wide deception of purchasers constitutes an "unfair" method of competition, but this question is neither novel nor unsettled. It is, moreover, settled adversely to petitioners.

Most of the misleading advertising and representations against which the Commission has issued cease and desist orders have not been inherently false.[11] *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, represents a typical proceeding of this kind. In that case the Commission found that respondents' product was improperly designated "white pine" and that use of this designation therefore constituted an "unfair" method of competition. The Circuit Court of Appeals held that there was no evidence to support the Commission's finding that this designation was improper and set aside the Commission's order. This Court recognized that there was conflicting evidence on the issue of misrepresentation but held that the Commission's findings, being supported by evidence, must be accepted since the courts are not authorized to determine the facts on the basis of their own independent appraisal of the testimony.

Plainly in the *Algoma* case respondents' designation of their product, while deceptive, was not inherently false. Respondents and others similarly circumstanced had used the designation in question for more than 30 years and its general

[11] There is, it would seem, little inducement to make inherently false statements, both because they are not likely to carry conviction and because of the damaging effect upon the seller if their falsity is exposed.

currency was recognized in a report on simplified trade practices published by the Bureau of Standards of the Department of Commerce (*Federal Trade Commission* v. *Algoma Lumber Co., supra,* at pp. 74, 79). The test which this Court said (p. 81) should be applied in determining whether a representation, made in competition in interstate commerce, was "unfair" was its "capacity to deceive," not whether it constitutes "fraud as understood in courts of law."

The petition for writ of certiorari assumes that petitioners' statements deceive only the careless or ignorant. Petitioners make no showing that the evidence establishes that the deceptive effect of their statements was so limited, but even if petitioners' factual assumption be accepted as sound, it constitutes no defense. The statutory prohibition of unfair methods of competition includes unfair competitive methods which avail to capture the trade of only the ignorant or gullible. *Federal Trade Commission* v. *Standard Education Society, supra,* at p. 116. As the Court there said, "Laws are made to protect the trusting as well as the suspicious."

CONCLUSION

The decision below is clearly correct and it presents no conflict and no unsettled question of statutory interpretation. It is therefore respectfully

submitted that the petition for a writ of certiorari should be denied.

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